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I. Introduction

Mr. Chairman and Members of the Committee, it is an honor and privilege to appear before you today to discuss border vulnerabilities, international terrorism, and the effect that Senate Bill 2611 would have on both. I come before you today in my capacity as a Professor of Constitutional Law and Immigration Law. I am also a practicing attorney who litigates regularly in the area of immigration and federal preemption. Between 2001 and 2003, I served as Counsel to the U.S. Attorney General at the Department of Justice. In that capacity, I was the Attorney General's chief adviser on immigration law. However, my testimony should not be taken to represent the past or present position of the U.S. Department of Justice. I offer my testimony solely in my private capacity as a Professor of Law.

I will focus my testimony on two subjects—the authority of state and local police to make immigration arrests in the war on terrorism, and the importance of physical barriers on our border in the war on terrorism. However, I will be happy to answer questions on any aspect of Senate Bill 2611 or immigration law generally.

II. The Authority of State and Local Police to Make Immigration Arrests in the Status Quo

It has long been widely recognized that state and local police possess the inherent authority to arrest aliens who have violated *criminal* provisions of the INA. Once the arrest is made, the police officer must contact federal immigration authorities and transfer the alien into their custody within a reasonable period of time.

Where some confusion has existed in recent years is on the question of whether the same authority extends to arresting aliens who have violated civil provisions of the INA that render an alien deportable. This confusion was, to some extent, fostered by an erroneous 1996 opinion of the Office of Legal Counsel (OLC) of the Department of Justice, the relevant part of which has since been withdrawn by OLC. However, the law on this question is now quite clear. As the OLC concluded and the Attorney General announced in 2002, arresting aliens who have violated either criminal provisions of immigration law or civil provisions that render an alien deportable "is within the inherent authority of the states."[1] And such inherent arrest authority has never been preempted by Congress.

This conclusion has been confirmed by every court to squarely address the issue. Indeed, it is difficult to make a persuasive case to the contrary. The source of this authority flows from the states' status as sovereign entities. It stems from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being

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[1] *See* ATTORNEY GENERAL'S REMARKS ON THE NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM, Washington, D.C., June 6, 2002. The 2002 OLC opinion is now publicly available. It may be found at http://www.cis.org/articles/2006/OLCOpinion2002.pdf and at http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0342.

committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

The Ninth and Tenth Circuits have expressed this understanding in the immigration context specifically. In *Gonzales v. City of Peoria*, the Ninth Circuit opined in an immigration case that the "general rule is that local police are not precluded from enforcing federal statutes," 722 F.2d 468, 474 (9th Cir. 1983). As the Tenth Circuit has described it, there is a "preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws," *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999). And again in 2001, the Tenth Circuit reiterated that "state and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (citing *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295). None of these Tenth Circuit holdings drew any distinction between criminal violations of the INA and civil provisions that render an alien deportable. Rather, the inherent arrest authority extends generally to both categories of federal immigration law violations.

Having established that this inherent state arrest authority exists, the second question is whether such authority has been preempted by Congress. Because Congress possesses plenary power over immigration, Congress may displace or preempt this arrest authority if it so chooses. In 2002, the OLC concluded that such preemption has not occurred, either with respect to criminal violations of immigration law or civil violations.

The Tenth Circuit has issued several opinions on the subject, all pointing to the conclusion that Congress has never sought to preempt the states' inherent authority to make immigration arrests for both criminal and civil violations of the INA. The most salient case on the preemption question is *U.S. v. Vasquez-Alvarez*: the "legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." 176 F.3d 1294, 1299 (10th Cir. 1999). Two years later, the Tenth Circuit reiterated in *United States v. Santana-Garcia*, that federal law "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." 264 F.3d 1188, 1193 (10th Cir. 2001) (*quoting Vasquez-Alvarez*, 176 F. 3d at 1300). The Fifth Circuit has reached substantially the same conclusion in *Lynch v. Cannatella*, 810 F.2d 1363, 1367 (5th Cir. 1987).

I have recently published an extensive law review article on this subject.[2] Copies are available for any Members of the Committee who are interested in exploring the subject further.

III. The Importance of Local Arrest Authority in the War on Terrorism

[2] Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2005).

One of most important lessons that our country learned on 9/11 was that state and local police can make the difference between an unsuccessful terrorist plot and an attack that kills 3,000.

In the aftermath of the attack, we learned that five of the nineteen hijackers had violated federal immigration laws while they were in the United States. *All five terrorists committed civil, not criminal, immigration violations.* Amazingly, four of the five were actually stopped by local police for speeding. All four terrorists could have been arrested, if the police officers had asked the right questions and realized that they were illegal aliens. To see just how critical a role state and local police can play, consider two of the 9/11 hijackers.

Lebanese terrorist Ziad Jarrah was the man at the flight controls of United Airlines Flight 93, which crashed in rural Pennsylvania. Jarrah first entered the United States in June 2000 through the Atlanta airport, on a tourist visa. He immediately violated federal immigration law by taking classes at the Florida Flight Training Center in Venice, Florida. He never applied to change his immigration status from tourist to student. He was therefore detainable and removable from the United States almost from the moment he entered the country. Jarrah committed his second immigration violation six months later—when he overstayed the period he was authorized to remain in the United States on his tourist visa.

Jarrah successfully avoided contact with state and local police for more than fourteen months. However, at 12:09 A.M. on September 9, 2001, two days before the attack, he was clocked at 90 miles-per-hour in a 65 miles-per-hour zone on Highway 95 in Maryland, 12 miles south of the Delaware state line. He was traveling from Baltimore to Newark, in order to rendezvous with the other members of his team.

The Maryland trooper did not know about Jarrah's immigration violations. Had the officer asked a few questions, such as what Jarrah's immigration status was, or simply made a phone call to the federal government's Law Enforcement Support Center (LESC)—which operates around the clock from Williston, Vermont—he could have arrested Jarrah. Instead, the trooper issued a Jarrah a $270 speeding ticket and let him go. The ticket would be found in the glove compartment of the car at Newark Airport two days later, left behind when Jarrah boarded Flight 93.

Or consider the case of Saudi Arabian terrorist Nawaf al Hazmi. Hazmi was the second-in-command of the 9/11 attackers, and a back-up pilot. He entered the United States through the Los Angeles International Airport on a tourist visa in January 2000. He rented an apartment with fellow hijacker Khalid Almihdhar in San Diego and lived there for more than a year. As with Jarrah, his period of authorized stay expired after six months. After July 14, 2000, Hazmi would be in the United States illegally. In early 2001, he moved to Phoenix, Arizona, to join another 9/11 hijacker, Hani Hanjour.

On April 1, 2001, Hazmi was stopped for speeding in Oklahoma while traveling cross country with Hanjour. Had the officer asked Hazmi a few basic questions or asked to see Hazmi's visa, he might have discovered that Hazmi was in violation of U.S. immigration law at the time. Once again, the officer could have detained him. The officer also had the authority to detain Hanjour, who had entered the country on a student visa, but never showed up for classes.

All of the 9/11 hijackers' encounters with local law enforcement were missed opportunities of tragic dimension. If even one of the police officers had made an arrest, the terrorist plot might have unraveled.

It is important to remember that the civil violations of the five 9/11 hijackers were similar to the actions of earlier terrorists. For example, in 1989, Kuwaiti terrorist Eyad Ismoil entered the United States on a student visa and enrolled at Wichita State University in Kansas. After three semesters he dropped out and worked with other members of his terrorist cell to prepare for the 1993 attack the World Trade Center. At that point he committed a civil immigration violation and was thereafter out of status. He ultimately drove the van that carried the bomb. That explosion killed six people and wounded more than 1,000 others.

Police departments across the country responded to the lessons of 9/11 and to the OLC opinion by exercising their inherent arrest authority with renewed determination. The number of calls to the LESC by local police officers who had arrested illegal aliens nearly doubled in the ensuing years, from 309,489 in FY 2002, to over 504,678 in FY 2005. Put differently, in FY 2005 local police were calling LESC to check an alien's status an average of 1,383 times a day. Local police have become a crucial force multiplier in the enforcement of federal immigration laws.

But Senate Bill 2611, if passed, would stop local police from protecting the American public in this way.

IV. The Dangerous Effect of Section 240D and Section 154

Buried deeply in the Senate Bill is a provision would disarm America's state and local police in the war against terrorism. Section 240D contains a statement that would have the effect of barring state and local police officers from making arrests for civil violations of immigration law—precisely the sort of violations that terrorist have demonstrated a propensity to commit.

Section 240D states: "Notwithstanding any other provision of law, law enforcement personnel of a State, or a political subdivision of a State, have the inherent authority of a sovereign entity to investigate, apprehend, arrest, detain, or transfer to Federal custody … an alien for the purpose of assisting in the enforcement of the *criminal* provisions of the immigration laws of the United States…. This State authority has never been displaced or preempted by Federal law." (Emphasis added.)

This provision sends an unmistakable message to the courts. Making arrests for criminal provisions of immigration law "has never been displaced… by Federal law," *but making arrests for civil provisions has been displaced*. No other conclusion can be drawn from the Senate's limitation of this authority to criminal violations only. A fundamental principle of statutory interpretation, one routinely applied in courts across the country, is "*Inclusio unius est exclusion alterius*." (The inclusion of one is the exclusion of another.) Where a statute expressly describes a particular situation in which it applies, an irrefutable inference must be drawn that what is omitted or excluded was intentionally omitted or excluded. I say this with the experience of having litigated numerous preemption cases in both state and federal court. This provision would be interpreted by any court as stripping arrest authority from the police in cases of civil violations.

Section 240D would restrict local police to arresting aliens for criminal violations of immigration law only, not civil violations. The results would be disastrous, and would significantly undermine the United States in the war on terrorism.

As noted already, all of the five 9/11 hijackers who committed immigration violations committed *civil* violations. Under the Senate Bill, police officers would have no power to arrest such terrorists.

Moreover, as a practical matter, Senate Bill 2611 would discourage police departments from playing *any* role in immigration enforcement. Most police officers (indeed, most *lawyers*) do not know which violations are criminal and which violations are civil. There is no particular logic to the distinctions. Overstaying a visa (something hijackers from the Middle East are more likely to do) is a civil violation, but marriage fraud is a criminal violation. Which one is more dangerous to national security?

Afraid of arresting the wrong type of illegal alien—and getting sued as a result—many police departments will stop helping the federal government altogether. That development would have a crippling effect in our efforts to locate alien terrorists on American soil.

Section 240D could have been worded, and could be fixed by stating, "criminal *and civil* provisions of the immigration laws." However, without this modification, it should not be enacted—unless Congress intends to strip local police of this arrest authority.

Equally problematic is Section 154 of Senate Bill 2611. This provision follows a section authorizing grants of federal funds to law enforcement agencies within 100 miles of the United States border. The grants are limited to dealing with "criminal activity" stemming from illegal immigration. Section 154 imposes the following caveat: "Nothing in this section shall be construed to authorize State or local law enforcement agencies of their officers to exercise Federal immigration law enforcement authority."

This provision not only contradicts the recognition of inherent arrest authority for criminal violations in Section 240D, it also misunderstands the nature of the states' inherent authority. States need not be authorized to make immigration arrests. States

may be authorized to exercise *broader* enforcement powers (beyond arrest, detention, and transportation to federal authorities, as is permitted under 8 U.S.C. § 1357g). But it is difficult to see how the preceding sections could be construed as including the full panoply of enforcement powers possessed by federal officers.

At best, Section 154 is nonsensical, ambiguous, and unnecessary. At worst, it could prompt a wayward court to conclude that all local arrest authority has been preempted. Regardless, its ambiguous terms should not be enacted into law.

V. Holes in the Wall—Sections 106, 114, and 117

In the years since the 9/11 attacks, the Department of Justice and later the Department of Homeland Security dramatically increased the scrutiny of aliens entering the United States legally through our ports of entry. I was personally involved in these efforts during my service in the Department of Justice. However, we knew then, and we know now, that our terrorist enemies would react to this increased security at ports of entry by relying more heavily on the practice of entering without inspection by sneaking across the border.

It is undeniable that terrorists have entered the United States by crossing our land borders illegally. The empirical evidence of terrorist entry is significant. Several cases are now publicly known. For example, on January 15, 2004, Mahmoud Kourani was indicted in Dearborn, Michigan, for conspiring to provide material support to a terrorist organization (Hezbollah). He had entered the United States by bribing a Mexican official to provide him a visa to enter Mexico, and then paying a coyote to smuggle him across the border into the United States. Kourani came to the attention of the INS while living with other illegal aliens in Dearborn and was initially imprisoned on immigration charges. It was later learned that he had trained with Hezbollah in Iran and Lebanon and was raising money for Hezbollah in the United States.

Another example that has been made public is that of Al Qaeda terrorist Farida Ahmed. On July 19, 2004, Ahmed was arrested in McAllen, Texas after crossing into the United States three days earlier. She had waded across the Rio Grande, and was bound for New York City. Terrorists know all about our porous southern border, and these cases demonstrate how effectively they have exploited it. And since 9/11 we have increased our security at ports of entry, which makes illegal border crossing an even more attractive means of entry. Moreover, we know that Hezbollah and Hamas maintain an active presence in the tri-border region of Brazil, Argentina, and Paraguay.

In addition to these specific cases, there are statistics suggesting that the number of terrorists crossing our southern border may be much higher than we think. *In Fiscal Year 2005, the Border Patrol Apprehended 3,722 aliens from nations that are either designated state sponsors of terrorism or places in which Al Qaeda has operated*.[3] We

[3] Afganistan, Algeria, Bahrain, Bangladesh, Cuba, Egypt, Eritrea, India, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. Department of Homeland Security statistics.

also know that for every one alien the Border Patrol apprehends, there may be three aliens who are not caught. If this is the case, then more than 10,000 aliens from high-risk, terrorist-associated countries illegally entered the United States in FY 2005. Obviously the majority of these aliens are not terrorists. But if only one in a thousand were, that would still be ten terrorists who successfully crossed our borders.

The construction of additional fencing on the borders is an absolutely essential response to this terrorist threat. Physical walls have been shown to dramatically reduce the flow of illegal aliens into the United States, in those sectors where substantial walls exist.

Unfortunately, Senate Bill 2611 makes it unlikely that any significant construction of border fencing will occur in the near future. There are three sections that ensure this outcome: Sections 106, 114, and 117.

Section 106 is problematic because it calls for such a restricted amount of additional fencing. Subsection 106(c) calls for only 370 miles of fencing. However, it states that the 370 miles may include the fencing already constructed in the San Diego, Tucson, and Yuma sectors. As a result, if in any construction actually occurred, it would likely be far less than 370 miles of additional fencing. This stands in stark contrast to the approximately 700 miles of additional fencing required by House Bill 4437.

Section 114 further reduces the amount of fencing that would be constructed by diverting available resources to Mexico's southern border. Subsection 114(b)(2) requires the U.S. government "to provide needed equipment, technical assistance, and vehicles to manage, regulate, and patrol" the border between Mexico and Guatemala and Belize. In an environment of scarce fiscal resources, these expenditures would likely cut into the funds available to build infrastructure on the United States border.

However, the greatest impediment to the construction of fencing is found in Section 117, primarily in subsection (d). This section creates a massive and unusual consultation requirement that must be satisfied "before the commencement of any construction." It stipulates that U.S. officials at the federal, state, and local level must consult with their counterparts in Mexico. I know of no other provision in U.S. law where the federal government attempts to compel state and local governments to engage in consultation as a prerequisite to action at the federal level. This aspect of Section 117(d) is an open invitation to delay construction indefinitely by bringing a Tenth Amendment lawsuit challenging the compelled consultation requirement under the "commandeering" theory laid out by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

Section 117(d) also enumerates the goals to be achieved by the consultation, including "solicit[ing] the views of affected communities." This provision would likely operate similarly to a comment period requirement in regulatory law. These requirements have the effect of significantly slowing the promulgation of regulations (which is intended). The same effect would result here—the creation of significant delays in the construction of any fencing.

This consultation requirement would create a massive impediment to the beginning of any construction. Because the State Department is the primary agency responsible for ensuring that this requirement is met, it is highly likely that the consultation will proceed extremely slowly. Based on my experience fulfilling interagency consultation requirements on behalf of the Department of Justice, I anticipate that the State Department would proceed extremely slowly and would defer to any assertion by the Mexican government that consultation was inadequate.

A defender of Senate Bill 2611 might answer this complaint by pointing to the two-year time deadline for completion of construction, found in Section 106(d). This answer is unpersuasive. In my experience working in the executive branch, I know of many deadlines that the government failed to meet (e.g., the comprehensive entry-exit system, which is still not completed). However, I know of no instances in which interagency consultation did not occur. This is due to the intrinsic nature of the executive branch, with competing agencies battling for control of policy. When parties to the consultation have differing perspectives on an issue, one party will always insist that additional consultation must occur. When a foreign power is added to a consultation requirement, this delaying effect is likely to be multiplied many times over.

In summary, because of these provisions in Senate Bill 2611, it is unlikely that construction on any fencing would begin quickly. If and when any construction occurred, the amount of fencing would be grossly inadequate to meet the very real threat of terrorists covertly crossing our southern border.